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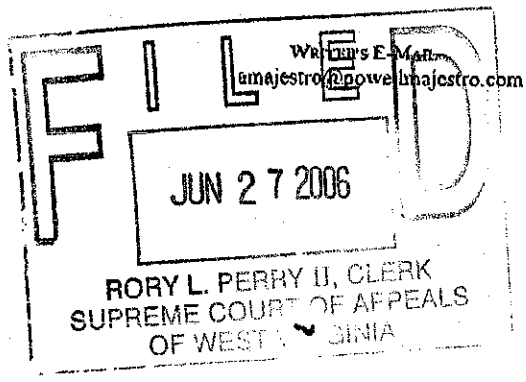

June 27, 2006

By Facsimile

Rory Perry, Clerk
West Virginia Supreme Court of Appeals
1900 Kanawha Blvd. E., Room E-317
Charleston, WV 25305

RE: Kessel, et al. v. Monongalia General Hospital, et al.
Civil Action No. 00-C-131
Appeal No. 33096

Dear Rory:

As per your conversation with my paralegal this morning, please be advised that the Petitioners intend to stand upon their argument in their Petition for Appeal. I understand that this notice is acceptable in lieu of resubmitting the Petition for Appeal as a brief.

If you have any questions, please do not hesitate to give me a call.

Sincerely,

Anthony J. Majestro, Esquire

AJM/jsn
cc: All Counsel of Record

No. _____

061180
33096

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

JAMES S. KESSEL, M.D.,
RICHARD M. VAGLIENTI, M.D., and
STANFORD J. HUBER, M.D.,

Petitioners/Plaintiffs Below,

v.

MONONGALIA COUNTY GENERAL HOSPITAL COMPANY d/b/a MONONGALIA GENERAL HOSPITAL, a West Virginia Non-Profit Corporation, MARK BENNETT, M.D., individually, BENNETT ANESTHESIA CONSULTANTS, P.L.L.C. and PROFESSIONAL ANESTHESIA SERVICES, INC.,

Respondents/Defendants Below.

APPEAL FROM THE CIRCUIT COURT OF MONONGALIA COUNTY, WEST VIRGINIA, THE HONORABLE RUSSELL M. CLAWGES, JR., CIRCUIT JUDGE, NOS. 00-C-131 & 01-C-212

PETITION FOR APPEAL

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TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES

PAGE

CASES

STATUTES, REGULATIONS, AND RULES

OTHER AUTHORITIES

PETITION FOR APPEAL

Petitioners, James S. Kessel, M.D., Richard M. Vaglienti, M.D. and Stanford J. Huber, M.D. ("plaintiffs"), by their undersigned counsel, file this Petition for Appeal from the Circuit's Court Order of December 29, 2005, as amended by the Order of March 30, 2006.

KIND OF PROCEEDING AND NATURE OF THE RULING BELOW

The underlying civil actions are a consolidation of two civil actions brought by three physician anesthesiologists who had staff privileges at the hospital operated by defendant Monongalia County General Hospital Co. (hereinafter "Monongalia General" or "the hospital"), but were no longer permitted to provide anesthesia in the hospital due to the hospital's exclusive contracts with other anesthesia providers. The defendants below are Monongalia General, along with Mark Bennett, M.D., Bennett Anesthesia Consultants, PLLC, and Professional Anesthesia Services, Inc., who were the other anesthesia providers selected by Monongalia General. The complaints alleged tortious interference with business relationships, violation of due process rights for failure to provide a fair hearing, restraint of trade, breach of contract, and breach of covenants of good faith and fair dealing.

On May 19, 2004, this Court answered certified questions from the Circuit Court finding that (1) Monongalia General's hospital medical staff bylaws did not constitute a contract since the essential element of valuable consideration was absent; and (2) that as a public or quasi-public hospital, Monongalia General was prohibited from entering into exclusive contracts with medical service providers that have the effect of completely excluding other physicians who have staff privileges at the hospital from the use of the

hospital's medical facilities. *See Kessel v. Monongalia County General Hosp. Co.*, 215 W.Va. 609, 600 S.E.2d 321 (2004) (*Kessel I*).

Following the decision in *Kessel I,* additional discovery was undertaken below. Defendants then sought partial summary judgment seeking dismissal of the claims for restraint of trade in violation of the West Virginia Antitrust Act, W.Va. Code § 47-18-1, *et seq.* ("the Act" or "Antitrust Act"). This claim, which is set forth in Count III of both complaints, alleges that the two exclusive contracts entered into between the hospital and the anesthesia defendants violated the Antitrust Act. The exclusive contracts at issue are the same contracts this Court found illegal in *Kessel I.* Following briefing and oral argument, the Circuit court entered an order on December 29, 2005, granting the motion for partial summary judgment and dismissing the antitrust claims in their entirety (hereinafter "SJ Order"). Subsequently, the plaintiffs sought an amendment to that order designating the SJ Order as final pursuant to Rule 54(b) for purposes of appeal. On March 30, 2006, the Circuit Court entered an Order granting that motion, expressly finding that there "exists no just reason for delay and that the Plaintiffs should be entitled to seek appellate review forthwith" thereby allowing this appeal. *See* Order of March 30, 2006. The Circuit Court, however, refused plaintiffs' request to stay the action pending a decision by this Court. *Id.* Trial in this action is currently set to commence June 13, 2006.

STATEMENT OF FACTS

This Court is familiar with the facts of this case from the prior appellate proceedings. As this Court previously summarized:

> The plaintiffs below, Dr. James W. Kessel, Dr. Richard M. Vaglienti, and Dr. Stanford J. Huber, are anesthesiologists who have been

> granted staff privileges at defendant Monongalia General Hospital (hereafter "Monongalia General" or "the hospital"), a 207-bed acute facility which provides surgical services to patients. The plaintiffs were employees and shareholders of Monongalia Anesthesia Associates, Inc. (hereafter "MAA") which originally entered into a contract with Monongalia General in 1975 for the provision of anesthesia services. This contract extended indefinitely, with a termination clause upon sufficient advance notice.
>
> In 1987, Monongalia General entered into an exclusive contract with another medical service provider to provide cardiac anesthesia services. At that time, MAA remained the primary provider of all other types of anesthesia services. In 1989, contract negotiations between the hospital and MAA failed to produce an extension of the contract, apparently due in part to the hospital's desire to add a contractual provision that tied staff privileges of MAA anesthesiologists to the exclusive contract. As a result, MAA continued to provide the primary non-cardiac anesthesia services for the hospital for approximately the next decade without a contract.
>
> In 1999, Monongalia General entered into an agreement with Dr. Mark Bennett and Bennett Anesthesia Consultants, PLLC, defendants below, to exclusively provide all anesthesia services for orthopedic patients at the hospital. Thereafter, the hospital sought a provider for all, save cardiac and orthopedic, general anesthesia services.
>
> At that point, MAA asserted that such actions constituted a reduction in privileges previously granted to its physicians for reasons unrelated to clinical competency in violation of the medical staff bylaws. A hearing was held before the Fair Hearing Panel as provided in the bylaws. The Panel recommended, *inter alia,* approval of contracting for anesthesiology services, since the privileges of MAA doctors had not been compromised. MAA appealed the recommendations to the Hospital Board of Directors which essentially accepted the recommendations.
>
> Thereafter, the hospital entered into a contract with Professional Anesthesia Services, Inc., which granted it the exclusive right to provide all other general anesthesia services at the hospital, with the exception of cardiac and orthopedic surgery patients. As a result, even though the plaintiffs maintain privileges at the hospital, they no longer are permitted to provide operative and orthopedic anesthesia in the hospital.

Kessel I, supra, 600 S.E.2d at 325. With respect to this appeal, certain other facts are relevant and are set forth below.

First, filed with these plaintiffs' responses to the summary judgment motion were certain exhibits. Two of the Exhibits were the above referenced contracts between the hospital and Professional Anesthesia Services ("PAS") (Plaintiffs' Exhibit B) and the hospital and Bennett Anesthesia Consultants ("BAC") (Plaintiffs' Exhibit C). Two provisions in each of the contracts are relevant. First, each of the contracts contains a provision explicitly making the two providers the exclusive anesthesia providers for their respective areas. *See, e.g.,* Plaintiffs' Exhibit B at p. 6 (making BAC exclusive provider for orthopedic anesthesia services); Plaintiffs' Exhibit C at p. 7 (making PAS exclusive provider for anesthesia services except orthopedic and cardiac cases). Second, each of the contracts contains agreements regarding the fees and billing policies to be charged by the providers. *See, e.g.,* Plaintiffs' Exhibit B at p. 22-23, §§ 5.1, 5.2 (adopting agreed schedule of charges and requiring hospital agreement to change it and requiring contractor agreement to comply with payment arrangements made by hospital with insurers and governmental payers); Plaintiffs' Exhibit C at p. 26-27, §§ 5.1, 5.2 (setting forth agreement regarding fees and requiring contractor agreement to comply with payment arrangements made by hospital with insurers and governmental payers). The deposition testimony in this case establishes that these provisions in the agreements constituted agreements between the defendants on the fees that could be charged for professional anesthesia services. *See* Boggess Deposition at pp. 36-37 (Plaintiff's Exhibit D); *see also* McNeil Deposition at pp. 63-66 (Plaintiffs' Exhibit E) (noting that agreements restrict amount PAS was allowed to bill).

Second, it is clear that the exclusivity provisions in these agreements were enforced and resulted in exclusion of the plaintiffs from the market. The record below

included letters from plaintiffs' predecessor to the hospital and responses confirming that plaintiffs would not be permitted to offer professional anesthesia services to hospital patients even if requested by the patient. *See* Plaintiffs' Exhibit D. These exclusivity agreements cannot be justified by any economic necessity. As Dr. Deer, a former member of defendant PAS, testified, other hospitals in this state operate without these arrangements and that this non-exclusivity works "well." *See* Plaintiffs' Exhibit F (Deer Depo.) at pp. 21-22.

Finally, included in the record as Exhibit A was the deposition of plaintiffs' expert Dr. Patrick C. Mann. In that deposition, Dr. Mann explained why it was not necessary as a matter of economics to address issues regarding the geographic market when the violation is a per se exclusion as is in this case. *See* Exhibit A at pp. 12-15. As Dr. Mann explained, when there is an exclusive restraint such as the one in this case, the focus is on the product not the geographic market. *Id.* Dr. Mann confirmed that his opinion was based upon and consistent with his extensive review of the economic literature in the area. *Id.* at p. 13.

ASSIGNMENTS OF ERROR

The assignments of error presented by this appeal involve the question of whether plaintiffs' antitrust claims constitute per se violations which do not require proof that the practices unreasonably restrain competition by examining the effect of the practices on competition in the relevant product and geographic markets. Based largely on federal precedent and the United States Supreme Court's opinion in *Jefferson Parish Hosp. Dist. No. 2 v. Hyde,* 466 U.S. 2 (1984), an opinion interpreting the federal Sherman Act, the defendants argued, and the Circuit Court accepted, the proposition that such proof was

required. Both reliance on the federal precedent and the refusal to give effect to the provisions of the West Virginia Antitrust Act and its legislative regulations that are not comparable to federal law led the Circuit Court to make the following errors which plaintiffs hereby assign for purposes of this appeal:

I. **THE CIRCUIT COURT ERRED IN CONCLUDING THAT IT WAS BOUND TO APPLY FEDERAL ANTITRUST PRECEDENT IN INTERPRETING PROVISIONS OF THE WEST VIRGINIA ANTITRUST ACT THAT ARE DIFFERENT FROM THE FEDERAL ACTS.**

II. **THE CIRCUIT COURT ERRED IN DETERMINING THAT THE PROVISIONS OF WEST VIRGINIA CODE § 47-18-3(B) WERE *"COMPARABLE"* TO THE SHERMAN ACT SUCH THAT IT WAS BOUND BY FEDERAL DECISIONS INTERPRETING THE SHERMAN ACT.**

III. **THE CIRCUIT COURT ERRED IN DETERMINING THAT THE CONTRACTS AT ISSUE DO NOT VIOLATE THE PER SE RESTRICTIONS CONTAINED IN W.VA. CODE § 47-18-3(B) AND W.V.C.S.R. § 142-15-3.**

POINTS AND AUTHORITIES AND DISCUSSION OF THE LAW

The history of the West Virginia Antitrust Act and its legislative regulations make it clear that the West Virginia Legislature did not intend to delegate the authority for interpreting the Act to the federal courts. Instead, the Legislature explicitly decided to depart from the federal antitrust statutes and codify certain activities as per se violations of the Act. The Circuit Court's refusal to recognize this intent constitutes a clear error of law demanding reversal by this Court.

I. THE CIRCUIT COURT ERRED IN CONCLUDING THAT IT WAS BOUND TO APPLY FEDERAL ANTITRUST PRECEDENT IN INTERPRETING PROVISIONS OF THE WEST VIRGINIA ANTITRUST ACT THAT ARE DIFFERENT FROM THE FEDERAL ACTS.

In this case, the Circuit Court essentially concluded that it was bound by federal precedent to grant summary judgment and dismiss plaintiffs' antitrust claims despite the fact that plaintiffs' claims were based on administrative and legislative provisions that do not appear in the federal acts. *See* SJ Order at 7. This Court has previously recognized that it is not bound to abdicate its duty to interpret West Virginia law by making its "legal analysis in this area . . . amount to nothing more than Pavlovian responses to federal decisional law." *Stone v. St. Joseph's Hosp. of Parkersburg*, 538 S.E.2d 389, 410 (W.Va. 2000) (concurring opinion); *see also Brooks v. Isinghood,* 584 S.E.2d 531 (W.Va. 2003) (quoting *Stone)*; *In re West Virginia Rezulin Litigation,* 585 S.E.2d 52, 61 (W.Va. 2003) (same). In this case both the relevant text and the applicable legislative rules, make the Circuit Court's Pavlovian reliance on the federal decisions cited by the defendants inappropriate.

In support of its reliance on federal precedent, the Circuit Court relied on West Virginia Code § 47-18-16 and this Court's opinion in *Gray v. Marshall County Board of Education*, 367 S.E.2d 751 (W.Va. 1988). For the reasons set forth below, these authorities are inapplicable to plaintiffs' claims in this case.

Section 16 of the Act provides that the Act "be construed *liberally* and *in harmony* with ruling judicial interpretations of *comparable* federal antitrust statutes." *Id.* (emphasis added). Based upon this provision, this Court in *Gray* found that a general claim based on W.Va. Code § 47-18-3(a) was subject to federal decisions interpreting the

identical provision of the federal Sherman Act, 15 U.S.C. § 1. *See syl. pt. 2, Gray, supra.* However, as this Court subsequently made clear, Sherman Act precedent is only relevant in interpreting provisions of the Antitrust Act that are analogous to the Sherman Act. "Under our Antitrust Act, the legislature has specifically directed that the statute 'be construed liberally and in harmony with ruling judicial interpretations of *comparable* federal antitrust statutes.'" *State ex rel. Palumbo v. Graley's Body Shop, Inc.*, 425 S.E.2d 177, 183 (W.Va. 1992) (emphasis by Court) (quoting W.Va. Code § 47-18-16). Thus, when the Sherman Act differs from West Virginia enactments, federal decisions "would not be applicable to our state civil antitrust statute." *Id.*

II. THE CIRCUIT COURT ERRED IN DETERMINING THAT THE PROVISIONS OF WEST VIRGINIA CODE § 47-18-3(B) WERE *"COMPARABLE"* TO THE SHERMAN ACT SUCH THAT IT WAS BOUND BY FEDERAL DECISIONS INTERPRETING THE SHERMAN ACT.

In this case, the Circuit Court essentially ignored the explicit provisions of Section 3(b) of the Act and its implementing regulations finding them "comparable" to provisions of federal law in spite of the fact the legislative history of the enactment of this subsection discloses quite a different intent. *See SJ* Order at p. 7. This determination was in error.

The applicable portion of the Sherman Act contains a general provision that makes "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal." 15 U.S.C. § 1. While the federal Sherman Act on its face applies to "[e]very . . . restraint of trade or commerce," it has not been so interpreted:

> Section 1 of the Sherman Act of 1890 literally prohibits *every* agreement "in restraint of trade." In *United States v. Joint Traffic Assn.*, 171 U.S.

> 505, 19 S.Ct. 25, 43 L.Ed. 259 (1898), we recognized that Congress could not have intended a literal interpretation of the word "every"; since *Standard Oil Co. of New Jersey v. United States*, 221 U.S. 1, 31 S.Ct. 502, 55 L.Ed. 619 (1911), we have analyzed most restraints under the so-called "rule of reason." As its name suggests, the rule of reason requires the factfinder to decide whether under all the circumstances of the case the restrictive practice imposes an unreasonable restraint on competition.
>
> The elaborate inquiry into the reasonableness of a challenged business practice entails significant costs. Litigation of the effect or purpose of a practice often is extensive and complex. Judges often lack the expert understanding of industrial market structures and behavior to determine with any confidence a practice's effect on competition. And the result of the process in any given case may provide little certainty or guidance about the legality of a practice in another context. The costs of judging business practices under the rule of reason, however, have been reduced by the recognition of per se rules. Once experience with a particular kind of restraint enables the Court to predict with confidence that the rule of reason will condemn it, it has applied a conclusive presumption that the restraint is unreasonable. As in every rule of general application, the match between the presumed and the actual is imperfect. For the sake of business certainty and litigation efficiency, we have tolerated the invalidation of some agreements that a fullblown inquiry might have proved to be reasonable.

Arizona v. Maricopa County Medical Soc., 457 U.S. 332, 342-344 (1982) (footnotes and internal citations omitted). Over the years some Sherman Act decisions have evidenced a move towards restricting per se rules. *Compare Dr. Miles Medical Co. v. John D. Park & Sons Co.*, 220 U.S. 373 (1911) (holding vertical agreements on resale prices illegal per se) and *Albrecht v. Herald Co.*, 390 U.S. 145 (1968) (resale price fixing is per se violation of antitrust law whether done by agreement or combination) *with State Oil Co. v. Khan*, 522 U.S. 3 (1997) (vertical maximum price fixing is not per se violation of the Sherman Act; overruling *Albrecht v. Herald Co*). Other decisions gravitated back and forth between per se rules and the rule of reason test. *Compare White Motor Co. v. United States*, 372 U.S. 253 (1963) (validity of a manufacturer's assignment of exclusive territories to distributors and dealers not per se unlawful) *with United States v. Arnold,*

Schwinn & Co., 388 U.S. 365 (1967) (Court reconsidered the status of exclusive dealer territories and held that, upon the transfer of title to goods to a distributor, a supplier's imposition of territorial restrictions on the distributor was "so obviously destructive of competition" as to constitute per se violation of the Sherman Act) *and with Continental T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36 (1977) (Court overruled *Schwinn*, and rejected application of per se rule in the context of vertical nonprice restrictions).

Beginning in the late 1960's and continuing through 1970's, several states adopted state law versions of the Sherman Act that contained both the Sherman Act's general prohibitions against unreasonable restraints of trade along with more specific statutory restrictions. *See, e.g.*, 740 ILCS 10/3 (Illinois Antitrust Act enacted in 1967 containing general prohibition against unreasonable restraints of trade or commerce along with specific prohibitions); Minn. Stat. §§ 325D.51, 325D.53 (Minnesota Antitrust Act enacted in 1971 containing general prohibition against unreasonable restraints of trade or commerce along with specific prohibitions); W. Va. Code § 47-18-3 (West Virginia Antitrust Act enacted in 1978 containing general prohibition against unreasonable restraints of trade or commerce along with specific prohibitions).

In West Virginia, the Antitrust Act adopts the Sherman Act's general prohibition on unreasonable restraints in W.Va. Code § 47-18-3(a); however, in subsection b, unreasonable restraints are defined to include the following specific per se restrictions:

> (b) Without limiting the effect of subsection (a) of this section, the following shall be deemed to restrain trade or commerce unreasonably and are unlawful:
>
> (1) A contract, combination or conspiracy between two or more persons:

(A) For the purpose or with the effect of fixing, controlling, or maintaining the market price, rate or fee of any commodity or service; or

(B) Fixing, controlling, maintaining, limiting or discontinuing the production, manufacture, mining, sale or supply of any commodity, or the sale or supply of any service, for the purpose or with the effect of fixing, controlling or maintaining the market price, rate or fee of the commodity or service; or

(C) Allocating or dividing customers or markets, functional or geographic, for any commodity or service.

(2) A contract, combination or conspiracy between two or more persons whereby, in the letting of any public or private contract:

(A) The price quotation of any bid is fixed or controlled; or

(B) One or more persons submits a bid intending it to be higher than another bid and thus complementary thereto, submits a bid intending it to be substantially identical to another bid, or refrains from the submission of a bid.

(3) A contract, combination or conspiracy between two or more persons refusing to deal with any other person or persons for the purpose of effecting any of the acts described in subdivisions (1) and (2) of this subsection.

Other specific per se violations are contained in certain legislative rules enacted by the Legislature including the per se prohibitions on tying agreements found in W.V.C.S.R § 142-15-3.1 which provides:

It shall be unlawful under W. Va. Code §§ 47-18-3, 4 for any person or group of persons to enter into tie-in agreements. Such agreements include, but are not limited to, agreements which condition or have the effect of conditioning the sale of one product or service upon the purchase of another product or service.

These specific West Virginia provisions, not present in the federal Sherman Act, have never been interpreted by this Court. However, authorities interpreting the similar Illinois and Minnesota provisions make it clear that the intent of similar specific provisions was to codify certain conduct as per se violations. The intent of these

codifications of per se rules was to mandate judicial treatment of these violations as per se violations.

For example, the statutory comments to the Illinois Act make it clear that the specific itemization of the prohibitions listed in 740 ILCS 10/3.1 was intended to codify the enumerated conduct as a per se violation. *See* 740 ILCS 10/3.1 at Comment ("Section 3(1) proscribes certain of the offenses which under federal law are termed "per se" offenses . . . . The conduct proscribed by Section 3(1) is violative of the Act without regard to, and the courts need not examine, the competitive and economic purposes and consequences of such conduct."). Judicial decisions and commentators have confirmed that the specific prohibitions contained in section 325D.53 of the Minnesota Act also were designed to "ensure that its enumerated activities will always receive per se scrutiny regardless of federal decisions under the Sherman Act." *State by Humphrey v. Alpine Air Products, Inc.*, 490 N.W.2d 888, 894 (Minn. App. 1992); s*ee also* Note, *Minnesota Antitrust Law of 1971,* 63 Minn.L.Rev. 907, 935 (1979) (cited in *Alpine, supra); cf. id.* at 912 (noting that "Some state statutes, for example, codify certain per se violations. . . Thus, as federal courts become more restrictive in defining the reach of the doctrine of per se illegality, certain state antitrust laws may become more advantageous to plaintiffs.").

Notably, the conclusion that these specific provisions were intended to codify the enumerated conduct as per se violations is made by the courts and commentators even though these jurisdictions also have doctrines encouraging interpretations of their acts consistent with federal law. *See, e.g., Alpine Air Products*, 490 N.W.2d at 894 ("Minnesota antitrust law should be interpreted consistently with federal court

interpretations of the Sherman Act unless state law is clearly in conflict with federal law."); 740 ILCS 10/11 (making federal law precedent when the language of the state act "is identical or similar to that of a federal antitrust law").

As noted above, because the "rule of reason" test imposes substantial burdens on the court system, the litigants, and those who seek to conform their conduct to the law, per se rules were judicially created to ease those burdens. *Arizona v. Maricopa County Medical Soc., supra.* After watching almost a century of litigation over when per se rules were appropriate, various state legislatures opted to legislatively create certain per se rules that would not be subject to judicial change. These legislatively created per se rules, like those found in W. Va. Code § 47-18-3(b), and in the laws of various other states, represent a conclusive *legislative* judgment that the costs to litigants and the judiciary of applying the rule of reason's case by case analysis are not justified in light of the evils condemned by these provisions.

Like the judicially created per se rules, the legislative decision to adopt these conclusive presumptions necessarily recognizes with respect to competition that "the match between the presumed and the actual is imperfect." *Arizona v. Maricopa County Medical Soc.*, 457 U.S. at 344. Notwithstanding this, the adoption of legislatively mandated per se rules constitutes a legislative judgment that such rules are justified "[f]or the sake of business certainty and litigation efficiency," even if they result in "the invalidation of some agreements that a fullblown inquiry might have proved to be reasonable." *Id.* The Circuit Court's failure to recognize this explicit policy decision was error.

Thus, the adoption of these specific provisions in the context of the debate over when per se rules are appropriate is clear evidence of an intent to codify the violations as per se violations. If all the Legislature intended was the statutory recognition of a common law claim for "restraint of trade," there was no need to adopt the specific provisions in subsection 3(b). The provisions in subsection 3(a) -- essentially adopting the Sherman Act -- would have been sufficient. Instead of recognizing this, the Circuit Court concluded that the fact that there was no definition of "restraint to trade" in the Act evidenced intent to apply the common law rule. SJ Order at p. 8. Both the premise and conclusion are, with all due respect, incorrect. While subsection 3(b) does not use the word "definition", even a cursory reading of its language reveals that defining conduct that constitutes a "restraint of trade" is the purpose of the provision. W.Va. Code § 47-18-3(b) ("the following *shall be deemed* to restrain trade or commerce unreasonably. . ." (emphasis added)). Contrary to the Circuit Court's conclusion, this clear language is a legislative direction that these explicit per se prohibitions shall constitute violations. If this is now thought to be bad policy, the remedy is legislative change – not ignoring the clear language and intent expressed when the Act was passed.

For the reasons noted below, the contracts and conduct in this case violate the specific provisions of W.Va. Code § 47-18-3(b) and W.V.C.S.R. § 142-15-3.1, and as such, are per se violations of the Antitrust Act. That these provisions may be different from federal law is by design and should not be troubling in the context of this case where this Court has already recognized that it is appropriate to adopt positions regarding these very contracts that are contrary to the "weight of authority elsewhere." *Kessel I,* 600 S.E.2d at 333 ("Also, while we acknowledge that the weight of authority appears to

support the right of hospitals to execute exclusive contracts, we do not agree with this authority."). Thus, for the reasons noted above, the per se treatment of the conduct enumerated by these specific provisions cannot be weakened by the federal decisions relied upon by the Circuit Court.

III. THE CIRCUIT COURT ERRED IN DETERMINING THAT THE CONTRACTS AT ISSUE DO NOT VIOLATE THE PER SE RESTRICTIONS CONTAINED IN W.VA. CODE § 47-18-3(B) AND W.V.C.S.R. § 142-15-3.

As noted above, the two contracts between the hospital and the anesthesia providers block the plaintiffs from competing to supply surgical anesthesia to the consumers purchasing surgical services from the hospital. In this case, this Court has already concluded that these contracts are neither reasonable nor justified.[1] For the reasons noted below, these agreements also violate the specific per se provisions of the Antitrust Act and its legislatively adopted rules. Consequently, the Circuit Court's conclusions to the contrary are in error.

A. The Challenged Agreements Constitute Illegal Tying Arrangement in Violation of the Provisions of *W.V.C.S.R. § 142-15-3.1.*

First, it is clear that the agreements constitute illegal tying arrangement. In the context of the agreements in this case, the tying arrangement is the fact that the purchasers of the hospital's operating room services (the "tying" service) are compelled to also purchase anesthesia services from the hospital's chosen anesthesia provider (the "tied" service). *See* SJ Order at p. 11. Relying on *Jefferson Parrish, supra,* the Circuit

[1] *Kessel I,* 600 S.E.2d at 332 (answering in the negative the question of "whether it is *reasonable* for a hospital to execute an exclusive contract which has the effect of completely depriving other staff physicians from practicing in the hospital") (emphasis added); *id. at* 333 (after considering the relevant interests in the case, Court agreed with plaintiffs that agreements were unreasonable and not "justified").

Court implied a requirement that the plaintiffs show that the defendants had market power prior to finding that the tying arrangement was illegal. While federal opinions like *Jefferson Parrish* may impose greater burdens in the case of a claim under the Sherman Act, the West Virginia Legislature in adopting the more restrictive provisions of the Antitrust Act and its implementing regulations have created a statutory scheme that does not require this proof.

In 1991, the Legislature adopted W.V.C.S.R. § 142-15-3.1. Under this provision, "agreements which condition or have the effect of conditioning the sale of one product or service upon the purchase of another product or service" are per se illegal. Thus, under the plain language of this provision, the contracts challenged here are illegal because they condition the purchase of hospital operating services on the purchase of anesthesia services.[2]

The Circuit Court refused to give effect to this legislative rule finding that it was in conflict "with legislative intent that is clearly set out by statute." SJ Opinion at 7 (citing *Fairmont General Hosp., Inc. v. United Hosp. Center, Inc.*, 624 S.E.2d 797 (W.Va. 2005)). The Circuit Court went on to conclude that the regulation conflicted with

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[2]There is no real issue that the exclusive anesthesia contracts at issue in this case constitute an agreement which conditions the sale of the hospital's surgical services on the purchase of anesthesia services from the hospital's designated providers. As even the Supreme Court opinion in *Jefferson Parish* noted, anesthesia and surgery are two separate services to which tying analysis is properly applied. *Jefferson Parish Hosp. Dist. No. 2 v. Hyde*, 466 U.S. 2, 22-23 (1984) ("Unquestionably, the anesthesiological component of the package offered by the hospital could be provided separately and could be selected either by the individual patient or by one of the patient's doctors if the hospital did not insist on including anesthesiological services in the package it offers to its customers. . . . The record amply supports the conclusion that consumers differentiate between anesthesiological services and the other hospital services provided by petitioners.").

W.Va. Code § 47-18-16 to the extent that it permitted courts to ignore federal antitrust precedent. These conclusions are incorrect.

Initially, the Circuit Court's reasoning appears to be circular. Plaintiffs argued that the Act and its implementing regulations are not comparable to the Sherman Act. Thus, based on this Court's holdings in *Graley's Body Shop, Inc., supra,* courts are not required to construe these different provisions in the same manner as under federal law because these unique provisions have no "comparable" federal provisions to which a consistent construction can be applied. Contrary to the Circuit Court's reasoning, section 16 does not require that legislative regulations conform to federal law when they implement provisions like subsection 3(b) which are not comparable to federal law. Indeed, even the federal courts have recognized that the harmonization provision, W.Va. Code § 47-18-16, does not conflict with legislative rules adopting standards under the act that are different from federal Sherman Act jurisprudence. *In re New Motor Vehicles Canadian Export Antitrust Litigation*, 350 F.Supp.2d 160, 175 (D. Me. 2004) ("The harmonization provision alone is not enough to amount to a direct statement, for harmonization is not as strict as the defendants would like. . . . The West Virginia harmonization principle (particularly in a sentence calling simultaneously for "liberal" construction) is simply not a direct statement prohibiting [the adoption of a rule inconsistent with United States Supreme Court's interpretation of the Sherman Act]").

Moreover, the Court's reliance on *Fairmont General Hosp., Inc. v. United Hosp. Center, Inc.*, 624 S.E.2d 797 (W.Va. 2005), is misplaced. In *Fairmont General Hosp.* the Court invalidated regulation was not a legislative regulation adopted under the provisions of the West Virginia Administrative Procedures Act which then are legislatively

approved. 624 S.E.2d at 800 & n. 8. Indeed, the challenged regulations in *Fairmont General Hosp.* specifically conflicted with a statute requiring that "[a]n application for a certificate of need may not be made subject to any criterion not contained in [W. Va. Code § 16-2D-1 *et seq.*] or not contained in rules adopted pursuant to [W. Va. Code § 16-2D-8]." 624 S.E.2d at 802 (alterations in original). Because the challenged five mile limit at issue in that case was not contained in either the code or legislative rules, the proposed criteria conflicted with the statute and was, therefore, invalid. *Id.* Because there is no conflict here, *Fairmont General Hosp., Inc.*, is simply inapplicable.

Moreover, *Fairmont General Hosp., Inc.'s* holding is inapplicable when applied to legislative regulations which are approved in bills which then become acts. It is clear under West Virginia law that legislative rules like W.V.C.S.R. § 142-15-3.1, have the force of law:

> What we suggested in *Appalachian Power Co.*, 195 W.Va. at 585, 466 S.E.2d at 436, we now hold:
>
> > "[o]nce a disputed regulation is legislatively approved, it has the force of a statute itself.... Being an act of the West Virginia Legislature, it is entitled to more than mere deference; it is entitled to controlling weight.

West Virginia Health Care Cost Review Authority v. Boone Memorial Hosp., 472 S.E.2d 411, 421 (W.Va. 1996). Indeed, even when the regulation was adopted as part of an omnibus bill, this Court decreed in *Boone Memorial Hospital* that in the future it would treat regulations (even ones adopted as part of omnibus legislation) as statutes and apply the usual rules of statutory interpretation:

> If the language of an enactment is clear and within the constitutional authority of the law-making body which passed it, courts must read the relevant law according to its unvarnished meaning, without any judicial embroidery. Even when there is conflict between the legislative rule and

> the initial statute, that conflict will be resolved using ordinary canons of interpretation. In this regard, it is a settled principle of statutory construction that courts presume the Legislature drafts and passes statutes with full knowledge of existing law. Accordingly, when two statutes conflict, the general rule is that the statute last in time prevails as the most recent expression of the legislative will.

Boone Memorial Hosp., 472 S.E.2d at 421 (citations omitted). Thus, because the tying regulation was enacted last, even if the Circuit Court was correct in concluding that there is a conflict, the enactment of the regulation "prevails as the most recent expression of the legislative will."[3] *Id.*

This conclusion is particularly appropriate when the legislative history of the applicable regulations is reviewed. The process leading to the adoption of the tying regulation establishes that the substance of the regulation was carefully considered during the process that led legislative approval. In this case, the regulations prohibiting tying were first put out for notice and comment and public hearing on July 6, 1990. *See* Exhibit 1 (attached Notice of Public Hearing on a Proposed Rule). The original proposed rule regarding tying was not a per se rule. *Id.* at proposed § 142-15-4.1. The proposed rule limited the prohibited conduct to "activities which restrain trade or commerce." *Id.*

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[3]Other Antitrust Act regulations inconsistent with Sherman Act jurisprudence have been approved even under the deference standard. In *In re New Motor Vehicles,* the court found that the West Virginia administrative regulation allowing indirect purchasers to assert antitrust claims which would be barred under federal precedent was valid under the standard requiring deference to administrative interpretations when the legislation does not directly speak to the matter. 350 F.Supp. 2d at 173-75. Application of the deference standard also compels acceptance of the regulation here. Like the indirect purchaser rule, the statute does not directly address the issue. Indeed, the provisions of W.Va. Code § 47-18-3(b) note that the prohibitions set forth therein are not the only ones subject to the ban in W.Va. Code § 47-18-3(a). The regulations that make tying arrangements per se illegal and overrule *Jefferson Parrish* are no more an unreasonable interpretation of the Act than the decision to administratively overrule the federal restrictions on antitrust actions by indirect purchasers at issue in *New Motor Vehicles, supra.*

Following notice and comment, the proposed rule was submitted for legislative approval to the Legislative Rule-Making Review Committee (a joint committee of the West Virginia Legislature headed by Sen. Lloyd Jackson and Del. Patrick Murphy) which made suggested changes to the proposed rule which were accepted by the Attorney General. *See* Exhibit 2 (attached Notice of Rule Modification of a Proposed Rule). The Rule-Making Review Committee then recommended that the Legislature adopt the proposed rules as modified. *See* Exhibit 3 (attached Notice of Action Taken by Legislative Rule-Making Review Committee). The Legislature then enacted the proposed regulations effective April 9, 1991. *See* W.Va. Code § 64-9-3(l) (1991); *see also* Exhibit 4 (attached Notice of Filing and Adoption of a Legislative Rule Authorized by the West Virginia Legislature).

The above history of the regulation's adoption also supports the conclusion that the intent was to adopt a standard different and stricter than the Supreme Court's interpretation of the Sherman Act in *Jefferson Parrish.* As noted above, the regulation was changed prior to legislative approval to delete the reference to restraining commerce. While such references were similar to the market impact test approved by the United States Supreme Court in *Jefferson Parrish, see, e.g.,* SJ Order at 11-12, the final rule reads as a flat per se restriction. *See* W.V.C.S.R. § 142-15-3.1 (making unlawful tying agreements without limitation). Moreover, the regulation was adopted after *Jefferson Parish* was decided. If the intent was to merely apply *Jefferson Parrish,* no administrative enactment was necessary as W. Va. Code § 47-18-16 and *Gray v. Marshall County Board of Education,* 367 S.E.2d 751 (W.Va. 1988), required that interpretation.

Nor can the rule be considered a codification of *Jefferson Parish.* The market focused test set forth in *Jefferson Parrish* was not enacted as the rule. Instead, the enactment of the strict prohibition against tying arrangements should be seen as the adoption of a strict per se rule rather than the market focused test set forth in *Jefferson Parrish* and other subsequent federal cases.

Finally, it cannot be contended in this case that the illegal tying arrangement in this case is justified by any legitimate business reasons. *See Kessel v. Monongalia County General Hosp. Co.*, 600 S.E.2d 321, 333 (W.Va. 2004) ("the *total* exclusion of physicians from their hospital practices, and the concomitant complete deprivation of patient choice, simply cannot be justified by the alleged ends to be achieved. In other words, this Court is convinced that a hospital can adopt less extreme measures to solve management problems such as scheduling conflicts and repeated delays in surgery complained of by Monongalia General."). As noted above, other hospitals in the State have been able to operate without exclusive contracts. Thus, while plaintiffs do not concede that any justification defense is available in the context of this per se violation, even if such a defense were available in this case, it could not factually be sustained.

B. The Challenged Agreements Constitute Price Fixing, Market Allocation, and Refusal to Deal in Violation of the Per Se Provisions of W.Va. Code § 47-18-3(b).

In addition to violating the per se rules against tying set forth above, the contracts at issue in this case also violate the specific per se restrictions in W.Va. Code § 47-18-3(b). The Circuit Court improperly ignored these provisions based on federal precedent that is not applicable to the specific West Virginia provisions.

1. Price Fixing

First, as noted above the contracts contain provisions constituting agreements to set the prices for the services charged by the anesthesiologists. These agreements constitute per se violations of W.Va. Code § 47-18-3(b)(1)(A) as they are contracts for "the purpose or with the effect of fixing, controlling, or maintaining the market price, rate or fee of any . . . service." This is a per se violation of the Antitrust Act that does not require any further market analysis. Plaintiffs raised this claim in both their original response to the motion for summary judgment served on September 21, 2005 (*see* p. 13 thereof) and additional evidence supporting that claim was filed with the their supplemental response to the motion served on October 21, 2006 (*see* p.2 thereof & Plaintiffs' Exhibits D, E) . The Circuit Court did not even address this claim.[4]

2. Market Allocation

Second, the contracts collectively allocate anesthesia services. Orthopedic anesthesia services are allocated to BAC while other anesthesia services are allocated to PAS. This is clearly an arrangement to "[a]llocat[e] or divid[e] customers or markets, functional or geographic, for any commodity or service."[5] As such these contracts and

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[4]To the extent that the Circuit Court rejected this claim as part of its holding that the per se restrictions on market allocation and exclusive dealing do not apply because of an alleged distinction between vertical and horizontal restraints, that distinction fails for this claim for the same reasons as set forth below. See, *infra.* Part III(B)(2).

[5]The Circuit Court's suggestion that a market allocation claim is limited to products and could not apply to services because it could find no precedent applying such a claim in the medical field, SJ Order at p. 15, is another example of the Court's improper focus on federal law rather than the explicit provisions of the West Virginia Act. The quoted reference above makes clear that subsection 3(b)(1)(C) explicitly applies to "*any* commodity or *service*." *Id.* (emphasis added).

arrangements violate the clear per se prohibitions set forth in W.Va. Code § 47-18-3(b)(1)(C).

The Circuit Court rejected this claim drawing a distinction between combinations of persons at different levels of the market structure such as suppliers and manufacturers ("vertical" arrangements) and arrangements between those at the same level of the market structure ("horizontal" arrangements). The Circuit Court adopted this distinction based on the federal antitrust law. SJ Order at p.15-16 (citing *United States v. TopCo. Associates., Inc.*, 405 U.S. 596 (1972)). Whatever basis exists for a horizontal/vertical distinction as a matter of federal law, it is clear that the West Virginia Act does not draw these distinctions.

As noted previously, the explicit statutory prohibitions contained in the West Virginia Act were first adopted in similar form in Illinois and Minnesota. *See, e.g.*, 740 ILCS 10/3 (Illinois Antitrust Act enacted in 1967 containing general prohibition against unreasonable restraints of trade or commerce along with specific prohibitions); Minn. Stat. §§ 325D.51, 325D.53 (Minnesota Antitrust Act enacted in 1971 containing general prohibition against unreasonable restraints of trade or commerce along with specific prohibitions). These similar Acts take two forms. The Illinois Act, and the model act upon which it is based, explicitly restricts the per se prohibitions to agreements between competitors – horizontal agreements. *See* 740 ILCS 10/3. When the legislatures in Minnesota and West Virginia adopted their statutes, they removed the horizontal limitation from the per se restrictions set forth in the Illinois Act and the draft of the model act upon which it was based, and adopted the same per se limitations without the

reference to agreements between competitors. *See* West Virginia Code § 47-18-3; Minn. Stat. §§ 325D.51, 325D.53.

As noted above, there was a considerable debate in the courts over the reach of per se violations as applied to vertical restraints. Some state statutes containing the same explicit restrictions on per se conduct set forth in the West Virginia Act chose to limit the per se prohibitions to horizontal restrictions only. The West Virginia Legislature, however, decided to remove this limitation on the enumerated per se violations evidencing intent to apply the prohibitions to both horizontal and vertical restrictions. Such a conclusion is also consistent with the direction to apply the doctrine of liberal construction. W.Va. Code § 47-18-16

Even if the distinction applies in this case, the arrangements still constitute a per se violation. First, the Circuit Court's treatment of the relationship between the hospital and the anesthesiologists as a vertical one was based upon an improper assumption. The anesthesiologists and nurse anesthetists who provided the professional services could easily have been employed by the hospital just as they are in other hospitals. Second, when the two agreements themselves are considered together, they clearly are part of a horizontal arrangement to divide the functional market of the hospital into orthopedic, cardiac, and all other surgical services. *See, e.g.,* Plaintiffs' Exhibit B at p. 6 (making BAC exclusive provider for orthopedic anesthesia services); Plaintiffs' Exhibit C at p. 7 (making PAS exclusive provider for anesthesia services except orthopedic and cardiac cases). The fact that the anesthesia defendants accepted the market allocation makes the arrangement between the three parties a horizontal one because the agreements contain an implied agreement not to compete with the other in contravention of this allocation.

Indeed, in *United States v. TopCo. Associates., Inc., supra*, the Supreme Court found that contracts between grocery stores and an association which licensed products to be sold only in specified geographic markets constituted illegal horizontal restraints subject to a per se restriction.

3. Refusal to Deal

To effectuate the per se illegal contracts and arrangements set forth above, it was necessary to exclude plaintiffs and any other anesthesia providers. As noted above, the exclusive provisions in the contracts were enforced and plaintiffs were specifically prohibited from providing orthopedic or general anesthesia services. This exclusion constitutes a separate violation as it is a "contract, combination or conspiracy between two or more persons refusing to deal with any other person or persons for the purpose of effecting any of the acts described in [W.Va. Code § 47-18-3(b)(1).]" W.Va. Code § 47-18-3(b)(3).

The Circuit Court rejected this per se claim based upon federal precedent requiring the application of the rule of reason test to this claim. SJ Order at pp. 10-11. Again, for the reasons noted above, the existence of this specific provision applying to these specific violations in the West Virginia Act evidences a clear intent to legislatively adopt per se rules against these refusals to deal regardless of (or in spite of) the fact that federal decisions reach different conclusions. This legislative determination that per se rules are appropriate in these cases is simply not something the Circuit Court had the power to disregard.

Finally, as noted above, like the per se tying violation, these per se violations in this case are not justified by any legitimate business grounds. *Kessel I, supra.*

RELIEF REQUESTED

For the reasons noted herein, plaintiffs/petitioners request that this Court grant the petition and reverse the Circuit Court's order granting partial summary judgment as to the plaintiffs' antitrust claims. Plaintiffs/petitioners hereby request oral presentation of this petition.

JAMES S. KESSEL, M.D., RICHARD M. VAGLIENTI, M.D., and STANFORD J. HUBER, M.D.,

By Counsel,

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(304) 623-4900
Counsel for Plaintiff James W. Kessel, M.D.

WEST VIRGINIA

SECRETARY OF STATE

KEN HECHLER

ADMINISTRATIVE LAW DIVISION

Form #1

FILED IN THE OFFICE OF THE SECRETARY OF STATE
THIS DATE July 6 1990
ADMINISTRATIVE LAW DIVISION

NOTICE OF PUBLIC HEARING ON A PROPOSED RULE

AGENCY: Attorney General TITLE NUMBER: 142

RULE TYPE: Legislative ; CITE AUTHORITY Code 47-18-20

AMENDMENT TO AN EXISTING RULE: YES ___ NO X

IF YES, SERIES NUMBER OF RULE BEING AMENDED: ___

TITLE OF RULE BEING AMENDED: ___

IF NO, SERIES NUMBER OF NEW RULE BEING PROPOSED: 15

TITLE OF RULE BEING PROPOSED: Defining Federal Antitrust Laws; Comparability and Activities Presumed to be Anticompetitive.

DATE OF PUBLIC HEARING: August 6, 1990 TIME: 11:00 am

LOCATION OF PUBLIC HEARING: Antitrust Division
812 Quarrier Street, Sixth Floor
Charleston, West Virginia 25301

COMMENTS LIMITED TO: ORAL ___, WRITTEN ___, BOTH X

COMMENTS MAY ALSO BE MAILED TO THE FOLLOWING ADDRESS: Constance R. Tsokanis
812 Quarrier Street
Fifth Floor - L & S Bldg.
Charleston, West Virginia 25301

The Department requests that persons wishing to make comments at the hearing make an effort to submit written comments in order to facilitate the review of these comments.

The issues to be heard shall be limited to the proposed rule.

ATTACH A **BRIEF** SUMMARY OF YOUR PROPOSAL

PLAINTIFF'S EXHIBIT 1

FISCAL NOTE FOR PROPOSED RULES

Rule Title: Defining Federal Antitrust Laws; Comparability and Activities Presumed to be Anticopetitive.

Type of Rule: X Legislative _____Interpretive _____Procedural

Agency Attorney General Address Constance R. Tsokanis
812 Quarrier Street
L & S Building 5th Floor
Charleston, West Virginia
25301

1. Effect of Proposed Rule	ANNUAL Increase	ANNUAL Decrease	FISCAL YEAR Current	FISCAL YEAR Next	FISCAL YEAR Thereafter
Estimated Total Cost	$ 0	$ 0	$ 0	$ 0	$ 0
Personal Services	0	0	0	0	0
Current Expense	0	0	0	0	0
Repairs and Alterations	0	0	0	0	0
Equipment	0	0	0	0	0
Other	0	0	0	0	0

2. Explanation of above estimates:

No additional personnel, equipment, or facilities will be required to implement the provisions of this rule.

3. Objectives of these rules:

The objective of these rules is to clarify the application of the West Virginia Antitrust Act.

4. Explanation of Overall Economic Impact of Proposed Rule.

A. Economic Impact on State Government.

None

B. Economic Impact on Political Subdivisions; Specific Industries; Specific groups of citizens.

None

C. Economic Impact on Citizens/Public at Large.

None

Date: 7/6/90

Signature of Agency Head or Authorized Representative

Daniel N. Hauch

TITLE 142

LEGISLATIVE RULE
ATTORNEY GENERAL

SERIES 15
DEFINING FEDERAL ANTITRUST LAWS; COMPARABILITY AND ACTIVITIES PRESUMED TO BE ANTICOMPETITIVE.

§ 142-15-1. General.

1.1 Scope - This rule shall apply to (a) any action brought by the Attorney General as parens patriae in federal court for violations of the federal antitrust laws under W. Va. Code § 47-18-17 (1986); (b) any anticompetitive activity under W. Va. Code § 47-18-3(a) performed by persons doing business or affecting commerce within the State; and (c) any action brought by the Attorney General of the State pursuant to W. Va. Code § 47-18-1 through -23.

1.2 Authority - This rule is authorized by W. Va. Code § 47-18-20.

1.3 Filing Date -

1.4 Effective Date -

1.5 Purpose - The purpose of this rule is to define the term "federal antitrust laws" as used within W. Va. Code § 47-18-17 (1986); clarify the meaning of the word "comparable" as used within -18-16, and the meaning of -18-3(a) in keeping with the beneficial purpose of the West Virginia Antitrust Act to foster competition in this State.

1.6 Construction - This rule shall be liberally construed to effectuate the beneficial purposes of the West Virginia Antitrust Act.

1.7 Severability - If, for any reason, any section, sentence, clause, phrase, or provision of this rule or the application thereof to any person or circumstances is held unconstitutional or invalid, such unconstitutionality or invalidity shall not affect other sections, sentences, clauses, phrases, or provisions or their application to any other person or circumstance, and to this end, each and every section, sentence, clause, phrase, or provision of this rule is hereby declared severable.

§ 142-15-2. Definition of "Federal Antitrust Laws" As Used in W. Va. Code § 47-18-17.

The term "federal antitrust laws" as used within W. Va. Code § 47-18-17 shall include the provisions of 15 U.S.C. §§ 1, 2, 3, 8, 13, 14, 18, 19, and 45(a) as they currently exist or as they may be amended from time to time.

§ 142-15-3. Comparability of state and federal antitrust law pursuant to W. Va. Code § 47-18-16.

Where the language of Article 18 of Chapter 47 of the West Virginia Code and the language of a federal antitrust statute are not substantially comparable, in terms of language or legislative intent, on issues of law or procedure, federal precedent shall not be applicable to interpretations of Article 18 of Chapter 47 of the West Virginia Code.

§ 142-15-4. Unlawful activities contemplated under the prohibition of "contract, combination in the form of trust or otherwise, or conspiracy in restraint of trade" as used in W. Va. Code § 47-18-3 (1986).

4.1 It shall be unlawful under W. Va. Code § 47-18-3 for a person or group of persons to engage in activities which restrain trade or commerce by entering into tie-in agreements. Such agreements include, but are not limited to, agreements which condition or have the effect of conditioning the sale of one distinct product or service upon the purchase of another distinct product or service.

4.2 It shall be deemed unlawful under W. Va. Code § 47-18-3 for any person or persons to overtly or tacitly enter into agreements resulting in reciprocity. Such agreements include, but are not limited to agreements in which the sale of a product or service is conditioned upon the seller's purchase of products or services produced or performed by the buyer.

STATE OF WEST VIRGINIA
OFFICE OF THE ATTORNEY GENERAL
CHARLESTON 25305

ROGER W. TOMPKINS
ATTORNEY GENERAL

(304) 348-2021

CONSUMER HOTLINE
(800) 368-8808

July 6, 1990

The Honorable Ken Hechler
Secretary of State
State Capitol, Room 157
Charleston, West Virginia 25305

Re: Promulgation of Proposed Legislative Rule pertaining to the definition of federal antitrust laws; comparability and activities presumed to be anticompetitive.

Dear Secretary Hechler:

Enclosed please find for filing each of the following documents:

- One (1) copy of the proposed rule;
- One (1) copy of the fiscal note for the proposed rule; and
- One (1) copy of the Notice of Public Hearing for the proposed rule.

Your attention and courtesies in this matter are greatly appreciated. If you or your staff have any questions regarding this matter, please do not hesitate to call Daniel N. Huck, Deputy Attorney General, Antitrust Division at 348-0246.

Sincerely,

Roger W. Tompkins

ROGER W. TOMPKINS
ATTORNEY GENERAL

RWT/jar

Enclosures

WEST VIRGINIA
SECRETARY OF STATE
KEN HECHLER
ADMINISTRATIVE LAW DIVISION
Form #4

Do Not Mark in this Box

FILED
1991 JAN 22 PM 4:09
OFFICE OF WEST VIRGINIA SECRETARY OF STATE

NOTICE OF RULE MODIFICATION OF A PROPOSED RULE

AGENCY: Attorney General TITLE NUMBER: 142

CITE AUTHORITY W. Va. Code 47-18-20 (1978)

AMENDMENT TO AN EXISTING RULE: YES___ NO X

IF YES, SERIES NUMBER OF RULE BEING AMENDED: _____

TITLE OF RULE BEING AMENDED: _____

IF NO, SERIES NUMBER OF NEW RULE BEING PROPOSED: 15

TITLE OF RULE BEING PROPOSED: Proposed legislative rule pertaining to defining the term "federal antitrust laws" and prohibiting tying and reciprocity

THE ABOVE PROPOSED LEGISLATIVE RULE, FOLLOWING REVIEW BY THE LEGISLATIVE RULE MAKING REVIEW COMMITTEE IS HEREBY MODIFIED AS A RESULT OF REVIEW AND COMMENT BY THE LEGISLATIVE RULE-MAKING REVIEW COMMITTEE. THE ATTACHED MODIFICATIONS ARE FILED WITH THE SECRETARY OF STATE.

Robert Wm. Schulenberg III
Senior Assistant Attorney General
Antitrust Division

PLAINTIFF'S EXHIBIT 2

TITLE 142

PROPOSED LEGISLATIVE RULE
ATTORNEY GENERAL
SERIES 15

Title: Proposed legislative rule pertaining to defining the term "federal antitrust laws" and prohibiting tying and reciprocity.

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§ 142-15-1. General.

1.1 Scope - This rule shall apply to any action brought by the Attorney General as parens patriae in federal court for violations of the federal antitrust laws under W. Va. Code § 47-18-17 (1978) and to any person who engages in trade or commerce in or affecting this State.

1.2 Authority - W. Va. Code § 47-18-20 (1978).

1.3 Filing Date -

1.4 Effective Date -

1.5 Purpose - The purpose of this rule is to define the term "federal antitrust laws" as used within W. Va. Code § 47-18-17 (1978) and to prohibit tying and reciprocity in any trade or commerce in or affecting this State.

1.6 Construction - This rule shall be liberally construed to effectuate the beneficial purposes of the West Virginia Antitrust Act.

1.7 Severability - If, for any reason, any section, sentence, clause, phrase, or provision of this rule or the application thereof to any person or circumstances is held unconstitutional or invalid, such unconstitutionality or invalidity shall not affect other sections, sentences, clauses, phrases, or provisions or their application to any other person or circumstance, and to this end, each and every section, sentence, clause, phrase, or provision of this rule is hereby declared severable.

§ 142-15-2. Definition of "Federal Antitrust Laws" As Used in W. Va. Code § 47-18-17 (1978).

The term "federal antitrust laws" as used within W. Va. Code § 47-18-17 (1978) shall include the provisions of 15 U.S.C. §§ 1, 2, 3, 8, 13, 14, 18, 19, and 45(a).

§ 142-15-3. Prohibited Conduct.

3.1 It shall be unlawful under W. Va. Code §§ 47-18-3, 4 (1978) for any person or group of persons to enter into tie-in agreements. Such agreements include, but are not limited to, agreements which condition or have the effect of conditioning the sale of one product or service upon the purchase of another product or service.

3.2 It shall be unlawful under W. Va. Code §§ 47-18-3, 4 (1978) for any person or persons to enter into agreements resulting in reciprocity. Such agreements include, but are not limited to, agreements in which the sale of a product or service is conditioned upon the seller's purchase of products or services produced or performed by the buyer.

WEST VIRGINIA LEGISLATURE
LEGISLATIVE RULE-MAKING REVIEW COMMITTEE
Room M-438, State Capitol
Charleston, West Virginia 25305
(304) 340-3286

Senator Lloyd Jackson, Co-Chairman
Delegate Patrick H. Murphy, Co-Chairman

Debra A. Graham, Counsel
Michael McThomas, Associate Counsel
Marie Nickerson, Admr. Assistant

NOTICE OF ACTION TAKEN BY LEGISLATIVE RULE-MAKING REVIEW COMMITTEE

January 9, 1991

TO: Ken Hechler, Secretary of State, State Register

TO: The Honorable Mario Palumbo
Attorney General
State Capitol
Charleston, WV 25305

FROM: Legislative Rule-Making Review Committee

PROPOSED RULE: Proposed legislative rule pertaining to defining the term "federal antitrust laws" and prohibiting tying and reciprocity

FILED
1991 JAN 23 PM 3:20
OFFICE OF WEST VIRGINIA SECRETARY OF STATE

The Legislative Rule-Making Review Committee recommends that the West Virginia Legislature:

1. Authorize the agency to promulgate the Legislative Rule
   (a) as originally filed
   (b) as modified by the agency ___X___

2. Authorize the agency to promulgate part of the Legislative rule; a statement of reasons for such recommendation is attached. _____

3. Authorize the agency to promulgate the Legislative rule with certain amendments; amendments and a statement of reasons for such recommendation is attached. _____

4. Authorize the agency to promulgate the Legislative rule as modified with certain amendments; amendments and a statement of reasons for such recommendation is attached. _____

5. Recommends that the rule be withdrawn; a statement of reasons for such recommendation is attached. _____

Pursuant to Code 29A-3-11(c), this notice has been filed in the State Register and with the agency proposing the rule.

cc: Robert Wm. Schulenberg III, Sr. Asst. AG
Donna S. Quesemberry, Asst. AG

PLAINTIFF'S EXHIBIT 3

WEST VIRGINIA
SECRETARY OF STATE
KEN HECHLER
ADMINISTRATIVE LAW DIVISION

Form #6

FILED
1991 APR -9 PM 1:31
OFFICE OF WEST VIRGINIA
SECRETARY OF STATE

NOTICE OF FINAL FILING AND ADOPTION OF A LEGISLATIVE RULE AUTHORIZED BY THE WEST VIRGINIA LEGISLATURE.

AGENCY: Attorney General TITLE NUMBER: 142

AMENDMENT TO AN EXISTING RULE: YES___, NO X

IF YES, SERIES NUMBER OF RULE BEING AMENDED: _____

TITLE OF RULE BEING AMENDED: _____

IF NO, SERIES NUMBER OF NEW RULE BEING PROPOSED: 15

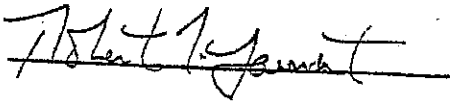
TITLE OF RULE BEING PROPOSED: Proposed legislative rule pertaining to defining the term "federal antitrust laws" and prohibiting tying and reciprocity

THE ABOVE RULE HAS BEEN AUTHORIZED BY THE WEST VIRGINIA LEGISLATURE.

AUTHORIZATION IS CITED IN (house or senate bill number) Senate Bill 637

SECTION 64-9-3 (1), PASSED ON March 9, 1991

THIS RULE IS FILED WITH THE SECRETARY OF STATE. THIS RULE BECOMES EFFECTIVE ON THE FOLLOWING DATE: April 9, 1991



PLAINTIFF'S EXHIBIT 4

TITLE 142.

PROPOSED LEGISLATIVE RULE
ATTORNEY GENERAL
SERIES 15

Title: Proposed legislative rule pertaining to defining the term "federal antitrust laws" and prohibiting tying and reciprocity.

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§ 142-15-1. General.

1.1 Scope - This rule shall apply to any action brought by the Attorney General as parens patriae in federal court for violations of the federal antitrust laws under W. Va. Code § 47-18-17 (1978) and to any person who engages in trade or commerce in or affecting this State.

1.2 Authority - W. Va. Code § 47-18-20 (1978).

1.3 Filing Date - April 9, 1991.

1.4 Effective Date - April 9, 1991.

1.5 Purpose - The purpose of this rule is to define the term "federal antitrust laws" as used within W. Va. Code § 47-18-17 (1978) and to prohibit tying and reciprocity in any trade or commerce in or affecting this State.

1.6 Construction - This rule shall be liberally construed to effectuate the beneficial purposes of the West Virginia Antitrust Act.

1.7 Severability - If, for any reason, any section, sentence, clause, phrase, or provision of this rule or the application thereof to any person or circumstances is held unconstitutional or invalid, such unconstitutionality or invalidity shall not affect other sections, sentences, clauses, phrases, or provisions or their application to any other person or circumstance, and to this end, each and every section, sentence, clause, phrase, or provision of this rule is hereby declared severable.

§ 142-15-2. Definition of "Federal Antitrust Laws" As Used in W. Va. Code § 47-18-17 (1978).

The term "federal antitrust laws" as used within W. Va. Code § 47-18-17 (1978) shall include the provisions of 15 U.S.C. §§ 1, 2, 3, 8, 13, 14, 18, 19, and 45(a).

§ 142-15-3. Prohibited Conduct.

3.1 It shall be unlawful under W. Va. Code §§ 47-18-3, 4 (1978) for any person or group of persons to enter into tie-in agreements. Such agreements include, but are not limited to, agreements which condition or have the effect of conditioning the sale of one product or service upon the purchase of another product or service.

3.2 It shall be unlawful under W. Va. Code §§ 47-18-3, 4 (1978) for any person or persons to enter into agreements resulting in reciprocity. Such agreements include, but are not limited to, agreements in which the sale of a product or service is conditioned upon the seller's purchase of products or services produced or performed by the buyer.

CERTIFICATE OF SERVICE

I, Anthony J. Majestro, do hereby certify that I served the foregoing **PETITION FOR APPEAL** this 12th day of April, 2006, by depositing a true and exact copy thereof in the United States mail, postage prepaid, upon the following:

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